No. 11896

United States
Circuit Court of Appeals
For the Ninth Circuit

RAYMOND M. NAYLOR,

Appellant,

vs.

WEST CONSTRUCTION COMPANY, a Corporation, and UNITED STATES OF AMERICA,

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

MESSRS. OSCAR A. ZABEL, and
FREDERICK PAUL

of Messrs. Zabel, Poth & Paul,
518 Fourth and Pike Bldg.,
Seattle 1, Washington,
Attorneys for Appellant.

MR. MAURICE R. McMICKEN,

827 Central Building,
Seattle 4, Washington,

Attorney for Appellee West Construction Company, a Corporation.

MESSRS. J. CHARLES DENNIS and
FRANK PELLEGRINI,

1017 U. S. Court House,
5th and Spring,
Seattle, Washington,

Attorneys for Appellee United States of America. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the Western District of Washington, Northern Division

Civil Action No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION COMPANY, a Corporation,

Defendant.

COMPLAINT

I.

Plaintiff brings this action to recover from the defendant unpaid overtime compensation, and an additional equal amount of liquidated damages on his own behalf, and he also brings this action as assignee on behalf of the other employees, and former employees of the defendant similarly situated, as hereinafter alleged in the various causes of action; that he also brings this action on behalf of other employees, and former employees similarly situated, who may hereafter join in this action, all pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Pub. No. 728, 75th Congress; 52 Stat. 1060), hereinafter referred to as the Act.

II.

Jurisdiction is conferred on the Court by Section 14 (8), 28, U. S. C. A. (Judicial Code) 24, giv-

ing the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," without regard to the citizenship of the parties, or the value or sum, in controversy, and by Section 16 (b) of the Act.

III.

That the defendant, West Construction Company, is a Massachusetts [2] corporation, and qualified to do business in the State of Washington; and, that said defendant, West Construction Company, was, and now is, engaged in the purchasing and using, selling and furnishing of materials, equipment, services and supplies in interstate commerce for the building of camps, tunnels, docks and bases in the Territory of Alaska; that the material, equipment and supplies were purchased at various places, both within and without the Territory of Alaska and the State of Washington, and shipped in interstate commerce to Alaska for use; that substantially all of said materials, equipment and supplies were produced for interstate commerce, and have been purchased, sold, offered for transportation, transported, shipped or delivered in interstate commerce from various points within and without the State of Washington and other States to Alaska, and from Alaska to other States.

IV.

That during the work weeks beginning 1943 to this date, defendant has employed a large number of men and women in the buying, selling and transporting of said materials, equipment, services and

supplies in Alaska, doing clerical, office, bookkeeping and accounting work necessary for the buying, selling and transporting of said materials, equipment, services and supplies, and in keeping payrolls and other records of other employees located in the Territory of Alaska, all in interstate commerce; that during said period, the defendant, who is engaged in the buying, selling and transporting of goods in interstate commerce, or engaged in operations necessary to the production of goods for interstate commerce within the meaning of the Act, employed the plaintiff, and other employees, and former employees who are similarly situated, who may hereafter join in this suit, to perform duties constituting an essential part of the handling and the buying, selling and transporting in interstate commerce of defendant's goods without [3] compensating them for overtime as provided by said Act; that the goods and services, purchased, sold and transported by such employees, during such period, have been produced for interstate commerce and have been sold, offered for transportation, transported, shipped or delivered in interstate commerce from various points within the various States of the United States to Alaska, and to and from the scene of operations where the plaintiff and said employees were employed.

V.

That in such business the defendant has employed the plaintiff, and the other named employees, in the various duties, and for the time described in their

various causes of action hereinafter alleged; and, that the functions performed by the plaintiff, and the other named employees, are an essential part of the handling, selling and transporting of defendant's goods, and they were transported and delivered in interstate commerce; and, that the performance of such duties constitute engaging in commerce within the meaning of the Act.

VI.

That during such period, defendant employed plaintiff, and other named employees, and other employees similarly situated, in the buying, selling, handling and transporting, or in occupations necessary to the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act for work weeks longer than the applicable maximum number of hours under Section 7 of the Act, and failed and refused to compensate them and said other employees, and former employees for such employment in excess of the applicable maximum hours under Section 7 of the Act, without compensating them for such excess hours at rates not less than one and one-half times the regular hourly rates at which they were, or are, employed, was in violation of Section 7 of the Act.

VII.

That during the periods alleged in the various causes of action herein, defendant employed the plaintiff, and other employees, and former employees, hereinafter named, and hereafter to be named, in its said operations, as aforesaid, in excess

of forty hours during each work week and paid wages to the plaintiff, and other employees, on the basis of a straight hourly rate for all hours worked per week; that under the provisions of Section 7 of the Act, plaintiff, and other named employees, and former employees, should have received an additional one-half time for all overtime hours worked each week, exclusive of the 7th day, and therefore should have received not less than the rate of time and one-half of their regular hourly rate of pay for all overtime hours worked in such work weeks.

VIII.

That from March 1, 1944, to and including, August 18, 1945, the defendant employed the plaintiff, Raymond M. Naylor, under the classification of Assistant Personnel Manager, performing duties pertaining to the hiring and clearing of men for employment and shipment to Alaska, meeting trains for incoming men, checking baggage and accompanying men to outgoing ships, meeting incoming ships for returning men, and assisting in clearing them, checking their baggage and accompanying men to outgoing trains, making arrangements for transportation to Seattle, making reservations on ships from Seattle to the Aleutians, and making arrangements for executives of the defendant to travel in various parts of the United States and Alaska, all in connection with the interstate commerce operations and transactions as alleged in paragraphs III to VII, inclusive, and who is also engaged in an occupation necessary to the move-

ment of goods in interstate commerce; and, that as such employee the plaintiff was engaged in interstate commerce, or in the production of goods for interstate commerce, within the meaning [5] of the Fair Labor Standards Act of 1938; and, that he worked regularly from March 1, 1944, to and including August 18, 1945, and by reason thereof the defendant became indebted to the plaintiff for a total of twenty-two hundred fifty overtime hours at the time and one-half rate, as alleged in paragraph VII, but that the said defendant, the employer, compensated him for his work at a rate which was less than one and one-half times his regular hourly rate at which he was employed, and by reason thereof, the defendant became indebted to the said Raymond M. Naylor in the sum of $2492.50, no part of which has been paid; that the Fair Labor Standards Act of 1938 further provides in Section 16 (b) thereof, that any employer who so violates the provisions of said Act, shall be liable to any employee affected in the amount of the said unpaid overtime compensation, and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs of said action; that the sum of $1250.00 is a reasonable attorney's fee on said plaintiff's cause of action.

And, for a Second Cause of Action Against the Defendant, Plaintiff claims and alleges, as follows:

I.

Repeats and realleges, as though fully set forth

herein, paragraphs I to VII, inclusive, of the first cause of action.

II.

That from February 12, 1944, to and including, May 5, 1945, the defendant employed the claimant, Richard T. Irby, under the classification of an Employee's Relations Advisor, performing duties pertaining to the making of recommendations for approval of appointments for employees in the Seattle Office, maintaining balance between contractors with respect to employees' salaries, and making recommendations for adjustments in same, and making recommendations for adjustment of employee's complaints and grievances, [6] and other incidental matters pertaining thereto, all in connection with the interstate commerce operations and transactions as alleged in paragraphs III to VII, inclusive, and who is also engaged in an occupation necessary to the movement of goods in interstate commerce; and, that as such employee the claimant was engaged in interstate commerce, or in the production of goods for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938; and, that he worked regularly from February 12, 1944, to and including May 5, 1945, and by reason thereof the defendant became indebted to the claimant for a total of two hundred fifty-six overtime hours at the time and one-half rate, as alleged in paragraph VII, but that the said defendant, the employer, compensated him for his work at a rate which was less than one and one-half times his regular hourly rate at which he was

employed, and by reason thereof, the defendant became indebted to the said Richard T. Irby in the sum of $659.60, no part of which has been paid; that the Fair Labor Standards Act of 1938 further provides in Section 16 (b) thereof, that any employer who so violates the provisions of said Act, shall be liable to any employee affected in the amount of the said unpaid overtime compensation, and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs of said action; that the sum of $350.00 is a reasonable attorney's fee on said claimant's cause of action.

III.

That the said Richard T. Irby has, in writing, assigned his said cause of action to the plaintiff herein, for the purpose of representing him in this suit and for the purpose of receiving and collecting on his behalf any judgment that might be obtained herein.

And, for a Third Cause of Action Against the Defendant, Plaintiff claims and alleges, as follows:

I.

Repeats and realleges, as though fully set forth herein, paragraphs I to VII, inclusive, of the first cause of action.

II.

That from January 7, 1944, to and including, April 29, 1945, the defendant employed the claimant, Stuart Hamilton Johnston, under the classifi-

cation of a Chief Expediter, performing duties pertaining to the expediting of materials from the suppliers to the Aleutians, assisting in the work of various employees in the Traffic Department, and other incidental duties pertaining thereto, all in connection with the interstate commerce operations and transactions as alleged in paragraphs III to VII, inclusive, and who is also engaged in an occupation necessary to the movement of goods in interstate commerce; and, that as such employee the claimant was engaged in interstate commerce, or in the production of goods for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938; and, that he worked regularly from January 7, 1944, to and including April 29, 1945, and by reason thereof the defendant became indebted to the claimant for a total of two hundred seventy-six overtime hours at the one-half time rate, as alleged in paragraph VII, but that the said defendant, the employer, compensated him for his work at a rate which was less than one and one-half times his regular hourly rate at which he was employed, and by reason thereof, the defendant became indebted to the said Stuart Hamilton Johnston in the sum of $238.20, no part of which has been paid; that the Fair Labor Standards Act of 1938 further provides in Section 16 (b) thereof, that any employer who so violates the provisions of said Act, shall be liable to any employee affected in the amount of the said unpaid overtime compensation, and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs [8]

of said action; that the sum of $150.00 is a reasonable attorney's fee on said claimant's cause of action.

III.

That the said Stuart Hamilton Johnston has, in writing, assigned his said cause of action to the plaintiff herein, for the purpose of representing him in this suit and for the purpose of receiving and collecting on his behalf any judgment that might be obtained herein.

And, for a Fourth Cause of Action Against the Defendant, Plaintiff claims and alleges, as follows:

I.

Repeats and realleges, as though fully set forth herein, paragraphs I to VII, inclusive, of the first cause of action.

II.

That from March 5, 1944, to and including, December 30, 1944, the defendant employed the claimant, Francis M. Watson, under the classification of a Recruiter, performing duties connected with, or pertaining to the hiring and clearing of men for employment and shipment of men to the Aleutians, including the meeting of trains for incoming men, checking baggage, and accompanying men to outgoing ships, meeting incoming ships for returning men, assisting in clearing them, checking baggage, and accompanying men to outgoing trains, and other incidental duties pertaining thereto, all in connection with the interstate commerce operations and transactions as alleged in paragraphs III to

VII, inclusive, and who is also engaged in an occupation necessary to the movement of goods in interstate commerce; and, that as such employee the claimant was engaged in interstate commerce, or in the production of goods for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938; and, that he worked regularly from March 5, 1944, to and including December 30, 1944, and by reason [9] thereof the defendant became indebted to the claimant for a total of fifteen hundred five overtime hours at the one-half time rate, as alleged in paragraph VII, but that the said defendant, the employer, compensated him for his work at a rate which was less than one and one-half times his regular hourly rate at which he was employed, and by reason thereof, the defendant became indebted to the said Francis M. Watson in the sum of $1075.86, no part of which has been paid; that the Fair Labor Standards Act of 1938 further provides in Section 16 (b) thereof, that any employer who so violates the provisions of said Act, shall be liable to any employee affected in the amount of the said unpaid overtime compensation, and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs of said action; that the sum of $550.00 is a reasonable attorney's fee on said claimant's cause of action.

III.

That the said Francis M. Watson has, in writing, assigned his said cause of action to the plaintiff herein, for the purpose of representing him in

this suit and for the purpose of receiving and collecting on his behalf any judgment that might be obtained herein.

Wherefore, Plaintiff prays for judgment against the defendant as follows:

1. On his first cause of action for the sum of $4985.00, together with attorney's fees in the sum of $1250.00;
2. On his second cause of action for the sum of $1319.20, together with attorney's fees in the sum of $350.00;
3. On his third cause of action for the sum of $476.40, together with attorney's fees in the sum of $150.00;
4. On his fourth cause of action for the sum of $2151.72, together with attorney's fees in the sum of $550.00; [10]
5. And, for plaintiff's costs and disbursements herein to be taxed.

OSCAR A. ZABEL,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 29, 1946. [11]

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES

Comes now the defendant West Construction Company, a corporation, and for answer to the

Complaint of the plaintiff herein, admits, denies and alleges as follows:

As to First Cause of Action:

I.

For answer to Paragraph I, admits plaintiff herein is bringing this action to recover overtime compensation and liquidated damages and states that it does not have sufficient knowledge or information concerning the other allegations contained in paragraph I upon which to form a belief as to the truth thereof and therefore denies the same.

II.

For answer to paragraph II. admits each and every allegation therein contained.

III.

For answer to paragraph III, admits that defendant is a Massachusetts corporation qualified to do business in the State of Washington, and denies each and every other allegation therein contained.

IV.

For answer to paragraph IV, admits the plaintiff and the other employees named in the various causes of action were [12] employees of defendant during the dates hereinafter in this answer specified and denies each and every other allegation therein contained.

V.

For answer to paragraph V, admits the plaintiff and the other employees named in the various

causes of action were employees of defendant during the dates hereinafter in this answer specified and denies each and every other allegation therein contained.

VI.

For answer to paragraph VI, denies each and every allegation therein contained.

VII.

For answer to paragraph VII, denies each and every allegation therein contained.

VIII.

For answer to paragraph VIII, admits that from April 4, 1944, to August 11, 1945, inclusive, defendant employed plaintiff Raymond M. Naylor as Assistant Personnel Manager, and denies each and every other allegation therein contained.

As to All Subsequent Causes of Action:

I.

In each and every cause of action set forth in the Complaint wherein paragraphs I to VII, inclusive, of the First Cause of Action are referred to by reference, the answer of defendant thereto is the same as to the corresponding paragraphs of the First Cause of Action. As to each of the Causes of Action, as set forth in the Complaint, exclusive of the First, defendant states it does not have sufficient knowledge or information upon which to form a belief as to whether the employees therein named have assigned their causes of action to the plaintiff and therefore [13] denies said allegations and calls

upon the plaintiff to file with the Clerk of the Court the written assignments of said claims.

Referring to the other allegations of the several Causes of Action, defendant admits, denies and alleges as follows:

As to the Second Cause of Action:

I.

For answer to paragraph II of the Second Cause of Action, as set forth in plaintiff's Complaint, admits that between February 16, 1944, and April 30, 1945, inclusive, defendant employed Richard T. Irby as Employee's Relations Advisor, and denies each and every other allegations therein contained.

As to the Third Cause of Action:

I.

For answer to paragraph II of the Third Cause of Action, as set forth in plaintiff's Complaint, admits that between January 10, 1944, and August 27, 1944, inclusive, defendant employed Stuart Hamilton Johnson as Expediter and as Chief Expediter between August 28, 1944, and April 30, 1945, inclusive, and denies each and every other allegation therein contained.

As to the Fourth Cause of Action:

I.

For answer to paragraph II of the Fourth Cause of Action, as set forth in plaintiff's Complaint, admits that between March 10, 1944, and December 30, 1944, inclusive, defendant employed Francis

M. Watson as Recruiter, and denies each and every other allegation therein contained.

By way of further Answer to the several Causes of Action as set forth in the Complaint herein, and as Affirmative Defenses thereto, defendant alleges:

I.

That each and all of the employees named in the several [14] Causes of Action, as set forth in the Complaint herein, during their employment by defendant were employed in a bona fide executive or administrative capacity and hence not subject to and are within the exemptions of the Fair Labor Standards Act of 1938, as amended.

II.

That none of the employees referred to in the several Causes of Action, as set forth in the Complaint herein, were engaged in commerce or in the production of goods for commerce while in the employ of the defendant and therefore were not subject to the Fair Labor Standards Act of 1938, as amended.

III.

That all of that part of the claims of the plaintiff and the assignors of the plaintiff accruing prior to two (2) years before January 29, 1946, the date of commencement of this action is barred by Section 165 of Remington's Revised Statutes of the State of Washington, both as to overtime compensation and liquidated damages.

IV.

That plaintiff Raymond M. Naylor, during the period May 2, 1945, to July 26, 1945, inclusive, and during the period July 31, 1945, to August 9, 1945, inclusive, was employed on temporary duty at Prince Rupert, British Columbia, Canada, and that any work performed for defendant by said Raymond M. Naylor during said two periods while outside the territorial jurisdiction of the United States was not subject to the provisions of the Fair Labor Standards Act of 1938, as amended.

Wherefore, having fully answered the Complaint of plaintiff herein, defendant prays that this action may be dismissed with prejudice and that it may recover its costs herein.

MAURICE R. McMICKEN,
Attorney for Defendant.

Copy received 3/15/47.
/s/ OSCAR A. ZABEL.

[Endorsed]: Filed March 7, 1947. [15]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF DEFENDANT

Comes now the defendant West Construction Company, and for amendment to the Answer and Affirmative Defenses of said defendant heretofore filed herein, and as additional affirmative defenses to the Complaint of plaintiff herein, alleges:

V.

That all contracts of employment between the plaintiff and defendant and between each of the assignor claimants and defendant, and wages and salaries paid thereunder were approved and paid in good faith by this defendant in conformity with and in reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to wit, the United States War Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of said United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendant belongs.

VI.

That any act or omission of defendant under the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff or any of the assignor claimants herein, was in good faith and in the reasonable belief on the part of defendant [16] that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended.

MAURICE R. McMICKEN,
Attorney for Defendant.

Copy received June 16, 1947.

ZABEL, POTH & PAUL,
By /s/ FREDERICK PAUL,
Atty. for Plaintiffs.

[Endorsed]: Filed Sept. 9, 1947. [17]

[Title of District Court and Cause.]

Court Room No. 1, Monday, December 29, 1947

Presiding: Honorable John C. Bowen.

ORDER SIGNED

Now on this 29th day of December, 1947, Frank Pellegrini, Assistant United States Attorney, appearing for the Government, these causes come on before the Court for hearing on Motion of United States for Leave to Intervene. The matter is called and granted without argument. Mr. Pellegrini states that this is agreeable to opposing counsel. Upon presentation by Robert W. Graham, an Order re interrogatories is signed in cause No. 1186 as well as above cases.

Journal No. 37, Page 873. [18]

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES IN INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.
2. That the Portal-to-Portal Act of 1947, ap-

proved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of that Act, it should first consider the defenses raised by the defendant which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question.

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent [19] with the constitutional validity of the said Portal-to-Portal Act of 1947.

TOM C. CLARK,
Attorney General.

By /s/ HERBERT A. BERGSON,
Acting Assistant Attorney General.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant United States Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the Attorney General.

JOHANNA M. D'AMICO,
Attorney, Department of Justice.

Copy Received 12-11-47.

ZABEL, POTH & PAUL,
By LM.

Copy received 12/11/47.

/s/ NORMAN R. McMICKEN,
Atty. for Defendant.

[Endorsed]: Lodged Dec. 11, 1947. Filed Dec. 29, 1947. [20]

In the District Court of the United States for the Western District of Washington, Northern Division

No. 1186

H. A. LASSITER and W. R. MORRISON,
Plaintiffs,

vs.

GUY F. ATKINSON COMPANY, a Corporation,
Defendant.

No. 1293

VERNON O. TYLER,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a Corporation, and MORRISON-KNUDSEN CO., a Corporation,

Defendants.

No. 1408

WILLIAM LESLIE KOHL,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a Corporation, and MORRISON-KNUDSEN CO., a Corporation,

Defendants.

No. 1420

ARTHUR J. SESSIN,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a Corporation, and MORRISON-KNUDSEN Co., a Corporation,

Defendants.

No. 1456

RAYMOND N. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION CO., a Corporation,

Defendant.

No. 1628

OWEN J. McNALLY,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a Corporation, and MORRISON-KNUDSEN CO.,

Defendants.

STIPULATION AND PRE-TRIAL ORDER RE PORTAL ACT HEARING

I.

It Is Hereby Stipulated by and between the parties hereto through their attorneys of record:

(1) That the above-named causes may be consolidated for purposes of hearing only those matters relating to the Portal-to-Portal Act of 1947 and in particular those matters relating to the defenses asserted by the defendants under Sections 9 and 11 of said Act, said hearing to be herein referred to as the Portal Act hearing.

(2) Defendants contend that the acts or omis-

sions complained of in these actions and each of them were in good faith in conformity with and in reliance on administrative regulations, orders, rulings, approvals or interpretations of an agency of the United States or administrative practices or enforcement policies of an agency of the United States with respect to the class of employers to which defendants belonged and plaintiffs deny the same.

(3) Defendants contend that the acts or omissions alleged as giving rise to these actions and each of them were in good faith and that the defendant had reasonable grounds for believing that the acts or omissions were not a violation of the Fair Labor Standards Act of 1938, and plaintiffs deny same.

(4) Plaintiffs contend that the Portal-to-Portal Act of 1947 is unconstitutional, and in particular such sections or portions thereof which may be deemed applicable to these causes or any of them, and defendants deny the same.

(5) In part II are listed certain exhibits which may be offered in the Portal Act Hearing for these causes by the respective parties together with the stipulations pertaining to said exhibits. With reference to said exhibits and with reference to all evidence and testimony to be introduced by any party at said Portal Act Hearing it is Stipulated as follows:

(a) All evidence, documentary or oral, relating to any one of the defendants shall be

deemed to relate to all of the defendants and all documents or communications sent to or received by one defendant shall be deemed to have been sent to, received by or come to the attention and within the knowledge of all other defendants. All information, knowledge, beliefs and actions of any of the defendants shall also be deemed to be the information, knowledge, beliefs and actions of all other defendants.

(b) The objections of any plaintiff as to the admissibility of any exhibit, as hereinafter reserved, or to any testimony shall be deemed the objection of all plaintiffs and the objection of any defendant as to the admissibility of any exhibit or testimony shall be deemed the objection of all other defendants.

(c) All objections to the admissibility of any exhibit listed in part II hereof save and except the objections to relevancy and materiality hereinafter noted are expressly waived by all parties, the identification and authenticity of all exhibits being admitted by all parties and it being expressly agreed that photostatic or other copies of all documents may be offered in lieu of the originals of such documents.

(d) In the event any appeal should be taken by any party to any of these causes it is Stipulated and Agreed that the original exhibits designated as a part of the record

on appeal shall, subject to the approval of the court, be transmitted to the Circuit Court of Appeals and not printed in the record.

(6) It Is Stipulated that all exhibits may be offered by all parties at the outset of the Portal Act Hearing subject to such reservations and objections as to relevancy and materiality as may hereinafter be noted. It is further Agreed that the offering of oral testimony may proceed and that the Court shall reserve ruling upon the admissibility of such exhibits to which objections are made. It is understood that any testimony relating to exhibits concerning which reservation of ruling is made shall be received subject to such ruling as may be made by the Court relative to these exhibits. It is Understood and Agreed that all counsel shall hold themselves in readiness upon call of the Court following the offering of oral testimony to be of such assistance as they may by way of oral argument or otherwise as an aid to the Court in determining such reservations of ruling as may be made.

Dated this 5th day of December, 1947.

BOGLE, BOGLE & GATES,
ROBERT W. GRAHAM,
Attorneys for Defendant Guy F. Atkinson Co. in Cause No. 1186.

ALLEN, HILEN, FROUDE & DeGARMO,
GERALD de GARMO,
Attorneys for Defendants S. Birch & Sons Construction Co., a Corporation, and Morrison-Knudsen Co., a Corporation, Cause Nos. 1293, 1408, 1420, 1628.

MAURICE R. McMICKEN,
Attorney for Defendant West Construction Co., a Corporation, Cause No. 1456.

ZABEL, POTH & PAUL,
FREDERICK PAUL,
Attorney for Plaintiffs in Cause Nos. 1186, 1456, 1628.

WETTRICK, FLOOD & O'BRIEN,
GEORGE J. TOULOUSE, JR.,
Attorneys for Plaintiffs in Cause No. 1293.

McMICKEN, RUPP & SCHWEPPE,
MARY ELLEN KRUG,
Attorneys for Plaintiffs in Cause Nos. 1408, 1420. [24]

ORDER

It is hereby Ordered that the terms and conditions embodied in the foregoing stipulation of counsel are hereby approved and the same shall be and hereby are, established to be the terms and conditions of the Portal Act Hearing on the above causes as defined in the foregoing stipulation.

Done in Open Court this 8th day of December, 1947.

JOHN C. BOWEN,
District Judge.

Presented by:

ROBERT W. GRAHAM,
Of Bogle, Bogle & Gates.

[Endorsed]: Filed Dec. 8, 1947. [25]

In the District Court of the United States for the Western District of Washington, Northern Division

Case No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION COMPANY,

Defendant.

Before: The Honorable John C. Bowen,
District Judge.

Seattle, Washington, January 16, 1948
10:00 o'Clock A.M.

COURT'S DECISION

The Court: As to Mr. Irby the Court is not convinced by the proof that he was acting in a capacity otherwise than as one exercising discretion and judgment as far as his work was concerned. That conclusion is supported by the witness McLeod that Mr. Irby's action as to what should be done about an employee's problems in his employment, whether he should be retained, fired, promoted, demoted or sent to some other area or recommended for such, rested upon Mr. Irby's final decision. That does not show him acting other than as a principal, vice-principal, or business manager in his department. An ordinary employee does not exercise such authority as that.

The Court finds, concludes and decides that as to Mr. Irby he was acting not in the capacity of an employee covered by the provisions of the Act but on the side of the principal who was the employer. He was acting in a managerial and administrative capacity from day to day and from time to time, employing his own discretion and judgment as to how his duty would be performed and as to the result of the performance by him of his duty.

As to each and all of the other plaintiffs and assignors to plaintiff, the Court is just as clearly convinced by the proof that they exercised no real discretion in their work but were following and applying a pattern in their work which was laid down for them and determined by others superior in authority in the company's organization.

There is no question but what the services of each one of the others concerned commerce and was a part of the commerce in which the defendant company unquestionably was engaged.

I do not think anything would be gained by discussing the details of their services as performed by [27] each of them because the evidence is clear that the nature of their services was of the character just stated by the Court and that the work and service of each one of the other persons involved here were covered by the provisions of the Act and they are, subject to later determination as to the defendant's good faith, entitled to the overtime stated in these exhibits less deductions on account of the work done in Canada and on account of the work done by one of them at a time before the period within which claims of this kind may be asserted.

Is there anything not covered by the announced decision? The other question, the defense of the defendants' of good faith, will be considered in connection with the same issue in other cases. Is there anything else?

Mr. Paul: No. I think that is all.

The Court: It is ordered that the settling and entering of findings of fact, conclusions of law and judgment in this case shall await the determination of the whole case and any other undecided issues. The case as to the issue of good faith will be heard at the times and in the manner arranged for similar hearings in the other cases. Is that agreeable?

Mr. Paul: Yes, your Honor.

Concluded. [28]

No. 1420

ARTHUR J. SESSING,

Plaintiff,

vs.

S. BIRCH & SONS and
MORRISON-KNUDSEN CO.,

Defendants.

No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION CO.,

Defendant.

No. 1628

OWEN J. McNALLY,

Plaintiff,

vs.

S. BIRCH & SONS and
MORRISON-KNUDSEN CO.,

Defendants.

Before: The Honorable John C. Bowen,
District Judge

Seattle, Washington, February 16, 1948
3:30 o'Clock P.M.

COURT'S DECISION

The Court: I wish to announce the Court's decision in these Fair Labor Standards Act cases which are pending in this Court and which have been tried. I wish the decision to be regarded as made in each and all of them unless, subsequent to the Court's announcement of decision, some other or different order is entered. I am referring to causes numbered 1186, 1293, 1408, 1420, 1456, and 1628.

Upon the question of whether or not in these cases the so-called Portal to Portal Act of 1947 is constitutional (defenses in the pending cases having pursuant to that Act been set up), I have no hesitancy in coming to the conclusion that it is constitutional. One reason which I wish to state why I think so is that the Act does not purport to take away or to deprive the plaintiffs of the right which they had under the law as it existed before that Portal to Portal Act was enacted by Congress.

The Portal to Portal Act merely declares that certain acts which occurred during the accrual of plaintiffs' right, if pleaded and proved to have been done in good faith reliance upon a ruling of a government agency, might be a defense which the defendant could set up against plaintiff employees' claims. In my opinion, former court decisions in other situations upholding the right of [31] legislatures to modify or create statutes of limitations in bar of existing claims are authority for upholding the power of Congress in the Portal to Portal

Act to say whether or not certain good faith acts of the defendants done during the time plaintiffs' causes of action were arising might operate as a defense in the hands of the defendant employers. There are other reasons in my opinion why the Act is constitutional but I will not stop to discuss them now.

I pass now to the question of whether or not the defendants have sustained the burden of establishing their affirmative defense of good faith asserted by them in accordance with the provisions of the Portal to Portal Act, that is, whether or not the acts and things done by them which are now complained of by the plaintiffs were done by the defendants in good faith reliance upon the construction put upon the contracts by a governmental agency or agencies. In that connection it may be observed that the contracts concerned the waging of war against the nation's enemies. The war times and the war policy of the nation as declared by acts of congress, and as declared more powerfully by the common consent of the rank and file of American citizens, called upon every citizen whether acting in a civilian or military capacity to do everything humanly possible to advance the cause of this nation in its war activity. And to [32] that end every person among us and every company or business operated by or for such a person was called upon to exert every possible effort to advance the cause of this nation at war.

These defendants, in line with that duty, consented to act under these contracts in a definite plan to advance that war effort. In doing so, they

agreed to be bound by a contract which the government's military powers exacted or prescribed. That contract in terms stipulated the method for determining or dealing with questions pertaining to the employer-employee relations and particularly in respect to overtime service of employees; and the contract stated that those matters should be referred to the War Department agency named in the contract. Both parties agreed that that was the proper way of dealing with those subjects. How then can it be questioned that the employer-contractor representing in a very real sense the duty of the citizen or his business organization should abide by the interpretations of the specific government agency designated in the contract as the agency of the War Department to make such interpretations? How can it be said that the contracting employers of these plaintiffs in doing so failed to exercise good faith in those subjects by not taking on the extra duty of looking elsewhere for interpretations not called for in the contract when such [33] other procedure might have violated the terms and provisions of the contract itself?

The Court finds, under the evidence in this case, that reasonable prudence and good faith did not call upon these employers of the plaintiffs in these actions to disregard the contract with the War Department and determine for themselves whether or not the Fair Labor Standards Act and the authorities of the government administering that Act had any jurisdiction over such matters as employer-employee relations and overtime pay of employees.

The evidence overwhelmingly convinces the Court that in respect to all these cases the employers in good faith and with the utmost caution lived up to the contracts they had with the War Department to build these military installations in Alaska and to do all the work and perform all of the services reasonably required to that end, and that in doing so the end result of their activities was more a military effort than a commercial effort, although in the course of performance of the contracts by the employers, they did carry on some commerce. Further, in the opinion of the Court, the contracting employers of plaintiffs amply demonstrated on every hand their purpose and determination to, and they did, exercise good faith in dealing with any and all questions as to employer-employee relations and in respect to overtime of employees, all in [34] accordance with the rulings of the agency of the government as provided in the contracts themselves.

For these, among other reasons, the Court finds, concludes and decides that the plaintiffs take nothing by their actions in each and all of these several actions pending in this Court.

* * * * * * *

The Court: Plaintiff McNally was engaged in commerce, but as to the Portal to Portal Act good faith affirmative defense, the Court makes the same decision in this case as that announced in the others, namely, that the defendants have alleged and proved by a preponderance of the evidence and by the overwhelming evidence that all matters and things respecting overtime done by the defendant employer

of plaintiff in this action were done in good faith reliance upon the rulings and interpretations made by an agency of the government as provided in the contract. Therefore, plaintiff McNally is not entitled to recover.

(Concluded.)

[Endorsed]: Filed March 2, 1948. [35]

In the District Court of the United States for the Western District of Washington, Northern Division

Civil Action No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION COMPANY, a corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action having come on regularly for trial in the above entitled court, sitting without a jury, plaintiff being represented by Frederick Paul, of Zabel, Poth & Paul, his attorneys, the defendant being represented by Maurice R. McMicken, its attorney, and the court having heard

the testimony of the witnesses, considered the evidence and being fully advised in the premises and having rendered its oral decision herein, the court does hereby make the following

FINDINGS OF FACT

I.

That this action was commenced and prosecuted by plaintiff on his own behalf, and as assignee of Richard T. Irby, Stuart H. Johnston and Francis M. Watson, pursuant to written assignments duly and regularly executed by said named assignors prior to the commencement of this action, under and by virtue of the Fair Labor Standards Act of 1938, as amended.

II.

That defendant is a Massachusetts corporation qualified to do business in the State of Washington.

III.

That during the years 1944 and 1945, defendant under certain Cost-Plus-a-Fixed-Fee contracts entered into with the United [36] States of America, acting by and through the Corps of Engineers of the United States War Department, was performing certain military construction work at Adak and at Shemya in the Aleutian Islands within the Territory of Alaska, and for the purpose of carrying out said contracts defendant was required to and did maintain a Seattle Office in which plaintiff and plaintiff's assignors were employed by defendant, as hereinafter set forth, and from which office de-

fendant purchased nearly $5,000,000 of materials and supplies throughout the United States for transportation to Alaska in interstate commerce for use on such contract jobsites, hired men throughout the United States in large numbers who were transported from their homes to the Alaska jobsites, and upon completion of their employment were transported from the jobsites in Alaska to their homes in the United States, and whose payroll records were maintained in the defendant's Seattle Office.

IV.

That plaintiff and plaintiff's assignors were engaged in assisting in the performance of defendant's contracts with the United States of America, and in the movement of materials and supplies in interstate commerce and the transportation and housing of personnel moving in interstate commerce, as follows:

(a) Plaintiff, Raymond M. Naylor, who was possessed of special training and experience in the handling of traffic and transportation, was employed by defendant from April 4, 1944, to August 12, 1945, inclusive, as Assistant Personnel Manager, at a base weekly salary of $63.63 for 40 hours of work for the period from April 4, 1944, to April 29, 1945, at Seattle, Washington, and from May 2 to July 26, 1945, inclusive, and from July 31 to August 9, 1945, inclusive, he was located at Prince Rupert, British Columbia, Canada, at a base salary varying from $63.63 to $73.17 per 40 hour week; that during the employment period at Seattle from April 4, 1944, to April 29, 1945, inclusive, plaintiff, Raymond M.

Naylor, [37] worked in the Transportation Division of the Personnel Department of defendant, and assisted in the transportation of workmen employed by defendant from their homes throughout the United States to Seattle and thence to the jobsites in Alaska, and from such jobsites at the completion of their contracts to Seattle and thence to their homes, and of the housing of all personnel at Seattle while awaiting transportation to the jobsites or to their homes, and in the course of such work he was assisted in the work by four employees; he made arrangements for rail transportation to and from Seattle, having authority to purchase railroad tickets on credit in defendant's name, and in arranging for the housing of men in Seattle while awaiting transportation to the jobsites or to their homes he had authority to place men in various hotels in Seattle on credit in the defendant's name; he met trains, ships and planes arriving and departing with jobsite employees, supervised their loading and unloading, and met hospital planes arriving with medical evacuees from the jobsites and arranged further medical facilities for them, in all of which work the said Raymond M. Naylor acted under the general supervision of defendant's Personnel Manager but was not required to and did not exercise discretion and independent judgment. That during the period from April 4, 1944, to April 29, 1945, inclusive, the said Raymond M. Naylor worked a total of 705½ hours in excess of 40 hours per week for which he was paid only straight time at the straight time rate of $1.5909 per hour.

(b) Plaintiff's assignor, Richard T. Irby, who was possessed of special training in the handling of employee problems, was employed by defendant from February 17, 1944, to April 30, 1945, inclusive, as Employee Relations Advisor at a base weekly salary of $68.18 for 40 hours of work from February 17, 1944, to December 3, 1944, inclusive, and at a base weekly salary of $70.00 for 40 hours of work from December 4, 1944, to April 30, 1945, inclusive; [38] and during such period of employment he was in direct charge of the Employee Relations Department which was a liaison office between employee and department head and between employee and the Contracting Officer; all requests for increases of salary for employees were subject to his approval or disapproval and transfers of employees from one department to another had to have his sanction; termination of employees could not be effective without his written approval and work referrals had to be okehed by him; he conducted orientation interviews with employees to provide information on working conditions, leave regulations, transportation, housing, etc., his duties being confined to Seattle Office employees of defendant; in all of which work the said Richard T. Irby acted in an administrative capacity under only the general direction of A. McLeod, defendant's Business Manager, and was required to and did exercise discretion and independent judgment. That during the period from February 17, 1944, to December 3, 1944, inclusive, the said Richard T. Irby worked a total

of 191 hours in excess of 40 hours per week for which he was only paid straight time at the straight time rate of $1.7054 per hour and during the period from December 4, 1944, to April 30, 1945, inclusive, he worked a total of 80 hours in excess of 40 hours per week for which he was only paid straight time at the straight time rate of $1.75 per hour.

(c) Plaintiff's assignor, Stuart H. Johnston, who was possessed of special training and experience in the expediting of materials and supplies, was employed by defendant from January 9, 1944, to August 27, 1944, inclusive, as an Expediter at a weekly base salary of $68.18 for 40 hours of work, and from August 28, 1944, to April 30, 1945, inclusive, as Chief Expediter at a weekly base salary of $70.00 for 40 hours of work; that as Expediter he worked in the Expediting Section of defendant's Purchasing Department and kept records of vendors' shipments to Government receiving warehouses, arranging for Government inspection of materials received, [39] spent considerable time in tracing lost or strayed shipments from vendors and phoned vendors to keep shipments rolling to arrive on delivery date promised, all under the direction of the Chief Expediter, all of which duties were largely clerical in nature and did not require the use of discretion or independent judgment; that after August 28, 1944, as Chief Expediter, Stuart H. Johnston worked in the Expediting Section of the defendant's Purchasing Department, assisted by six employees of said Section, instructed employees in

the proper handling of Purchase Orders on the defendant's war contracts, determined the method of expediting the movement of materials and supplies from vendors throughout the United States to Seattle and Alaska, prepared weekly shipping status reports for the jobsite offices and weight displacement reports for the United States Engineers, in all of which work he was not required to and did not exercise discretion and independent judgment. That during the period January 31, 1944, to August 27, 1944, inclusive, the said Stuart H. Johnston worked a total of 116 hours in excess of 40 hours per week for which he was paid only straight time at the straight time rate of $1.7054 per hour, and during the period August 28, 1944, to April 30, 1945, inclusive, he worked a total of 135½ hours in excess of 40 hours per week for which he was paid only straight time at the straight time rate of $1.75 per hour.

(d) Plaintiff's assignor, Francis M. Watson, who was possessed of special training and experience in the hiring of personnel, was employed by defendant from March 10, 1944, to December 31, 1944, inclusive, as a Recruiter, at a weekly base salary of $59.09 for 40 hours of work, and during such period of employment he interviewed at defendant's Seattle Office applicants for work as manual employees at the jobsites in Alaska, such men being either Seattle residents or men not local residents but not brought to Seattle by defendant and using Seattle as their place of hire, and he selected [40] or

rejected applicants on the basis of their written application, oral statements, appearances and references, and as such Recruiter, Francis M. Watson was under the general supervision of defendant's Personnel Manager, and in all of such work he was not required to and did not exercise discretion and independent judgment. That during said period from March 10, 1944, to December 31, 1944, inclusive, he worked a total of 410 hours in excess of 40 hours per week for which he was paid only straight time rate of $1.4772 per hour.

V.

That all practices of the defendant with respect to the payment of overtime compensation for all hours worked by plaintiff and plaintiff's assignors in excess of forty (40) hours in any one week were in good faith in conformity with and in reliance on administrative regulations, rulings, approvals and interpretations of the following agencies of the United States, to wit, the United States War Department, the Corps of Engineers of the United States War Department and the War Department Wage Administration Agency.

VI.

That all practices of the defendant with respect to the payment of overtime compensation for all hours worked by plaintiff and plaintiff's assignors in excess of forty (40) hours in any one week were in good faith and that the defendant had reasonable grounds for believing that such practices were not

a violation of the Fair Labor Standards Act of 1938, as amended.

Done in Open Court this 3rd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge. [41]

From the foregoing Findings of Fact, the Court does hereby make the following

CONCLUSIONS OF LAW

I.

That the plaintiff, Raymond M. Naylor, and plaintiff's assignors, Richard T. Irby, Stuart H. Johnston and Francis M. Watson, were engaged in interstate commerce during their respective periods of employment by the defendant.

II.

That plaintiff's assignor, Richard T. Irby, was a bona fide administrative employee of defendant under and within the terms and provisions of the Regulations of the Administrator of the Wage & Hour Division of the United States Department of Labor during his entire time of employment by defendant and hence is not subject to and is within the exemptions of the Fair Labor Standards Act of 1938, as amended.

III.

That the two-year Statute of Limitations of the State of Washington is applicable to the causes of action asserted by the complaint herein, and any

recovery for overtime prior to January 29, 1944, is barred by such statute.

IV.

That the Fair Labor Standards Act of 1938, as amended, has no application to work performed by plaintiff Raymond M. Naylor while he was at Prince Rupert, British Columbia, Canada.

V.

That if it were not for the provisions of the Portal-to-Portal Act of 1947, plaintiff Raymond M. Naylor and his assignors Stuart H. Johnston and Francis M. Watson would have been entitled to judgments against defendant under the Fair Labor Standards Act of 1938, as amended, for the following amounts for unpaid overtime compensation: Raymond M. Naylor $561.19, Stuart H. Johnston $217.47 and [42] Francis M. Watson $302.84, plus similar amounts as liquidated damages, plus costs and a reasonable attorney's fee.

VI.

That the Portal-to-Portal Act of 1947 is, and sections 9 and 11 thereof are, constitutional.

VII.

That the defendant is subject to no liability to the plaintiff or to any of the plaintiff's assignors, for or on account of defendant's failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

VIII.

That the action of the plaintiff herein should be dismissed with prejudice and with costs in favor of the defendant, to be taxed in accordance with law and the rules of this Court.

Done in Open Court this 3rd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:
/s/ MAURICE R. McMICKEN.

Copy received March 3, 1948.
/s/ FREDERICK PAUL,
Attorney for Plaintiffs.

[Endorsed]: Filed March 3, 1948. [43]

In the District Court of the United States for the Western District of Washington, Northern Division

Civil Action No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION COMPANY, a Corporation,

Defendant.

JUDGMENT

The above-entitled action having come on regularly for trial in the above-entitled court, sitting without a jury, plaintiff being represented by Frederick Paul, of Zabel, Poth & Paul, his attorneys, the defendant being represented by Maurice R. McMicken, its attorney, and the court having heard the testimony of the witnesses, considered the evidence and being fully advised in the premises, having rendered its oral decision herein and having made and entered its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the action of the plaintiff herein be and the same is hereby dismissed, with prejudice and with costs in favor of the defendant and against the plaintiff, to be taxed in the manner provided by law and by the rules of this Court.

Done in Open Court this 3rd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:
/s/ MAURICE R. McMICKEN.

Approved as to form:
/s/ FREDERICK PAUL.

[Endorsed]: Filed Mar. 3, 1948. [44]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: West Construction Company, a Massachusetts Corporation, Defendant, and to Maurice McMicken, Attorney for Said Defendant, and to United States of America and J. Charles Dennis, Its Attorney:

Notice is hereby given that the above-named plaintiff appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, involved in all causes of action entered in the above-named action on the 2nd day of March, 1948, and which is now final.

Dated at Seattle, Washington, this 22nd day of March, 1948.

ZABEL, POTH & PAUL and
FREDERICK PAUL,
FREDERICK PAUL,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 25, 1948. [45]

In the District Court of the United States for the Western District of Washington, Northern Division

Civil Action No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION COMPANY, a Corporation,

Defendant.

UNITED STATES OF AMERICA,

Intervenor.

AMENDED STATEMENT OF POINT ON APPEAL OF APPELLANT, RAYMOND M. NAYLOR

The point on the appeal of the appellant, Raymond M. Naylor, is that the Portal-to-Portal Act of 1947, Sections 9 and 11 thereof, are unconstitutional as the deprivation of property without due process of law and the usurpation of the Judicial power by the Congress of the United States, except cause of action No. 2, Richard T. Irby.

ZABEL, POTH & PAUL and
FREDERICK PAUL,
FREDERICK PAUL,
Attorneys for Plaintiff.

Endorsed: Copy Received March 25, 1948.
MAURICE R. McMICKEN,
By Atty. for Defendant.

Endorsed: Received a copy of the within Amended Statement of Points this 25th day of March, 1948.

J. CHARLES DENNIS,
Attorney for Intervenor.

[Endorsed]: Filed Mar. 15, 1948. [46]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men By These Presents:

That I, Raymond M. Naylor, the plaintiff above named, as principal and the National Surety Corporation, a corporation, organized under the laws of the State of New York, and authorized to transact business of surety in the State of Washington, as surety are held and firmly bound unto West Construction Company, a Massachusetts corporation, the defendant named in the above-entitled action, and United States of America, intervenor, in the just and full sum of $250.00, for which sum well and true to be paid, we bind ourselves, our and each of our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of April, 1948.

The condition of this obligation is such, that whereas, the above-named defendant on the 2nd day of March, 1948, in the above-entitled action and

court, recovered judgment against the plaintiff above named; and whereas, the above-named principal has heretofore given due and proper notice that his appeals from said judgment of the above-entitled court to the Circuit Court of Appeals [47] for the Ninth Circuit,

Now, Therefore, if the said principal, Raymond M. Naylor, shall pay to West Construction Company, a Massachusetts corporation, and to United States of America, all costs and damages that may be awarded against said defendant and intervenor on the appeal, or on the dismissal thereof, not to exceed the sum of $250.00 and shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the United States Circuit Court of Appeals for the Ninth Circuit may render, or make, or order to be rendered, or made by the above-entitled court, then this obligation to be void; otherwise to remain in full force and effect.

RAYMOND M. NAYLOR,
By ZABEL, POTH &
FREDERICK PAUL,
His Attorneys.

NATIONAL SURETY
CORPORATION,
[Seal] By MILDRED PALITZKE,
Attorney-in-Fact.

[Endorsed]: Filed April 12, 1948. [48]

[Title of District Court and Cause.]

AMENDED PLAINTIFF'S DESIGNATION OF PORTIONS OF RECORD ON APPEAL

The above-named plaintiff, appellant herein, hereby supplements its designation of the following portions of the record in the above-entitled action for transmittal by the Clerk of the above-entitled Court to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Complaint.
2. Answer and Affirmative Defense.
3. Amendment to Answer of Defendant.
4. Pleading of the United States in Intervention.
5. Stipulation of Pre-Trial Order re Portal Act hearing, pgs. 1, 2, 3 and up to line 10 of p. 4, and pgs. 43 and 44.
6. The Court's Oral Decision of January 16, 1948.
7. The Court's Oral Decision of February 16, 1948, pgs. 1, 2, 3, 4, 5 and 6, up to and including line 7 of p. 7, and lines 2 to 12, inclusive, of p. 10.

7a. Findings of Fact and Conclusions of Law.

8. Judgment.
9. Notice of Appeal.
10. Amended Statement of Point on Appeal.
11. Stipulation for Costs.

12. This Amended Designation of Portions of the Record.

ZABEL, POTH & PAUL and
FREDERICK PAUL,
FREDERICK PAUL,
Attorneys for Plaintiff.

Endorsed: Received a copy of the within Amended Designation, etc., this 25th day of March, 1948.

J. CHARLES DENNIS,
Attorney for Intervenor.

Endorsed: Copy Received March 25, 1948.

MAURICE R. McMICKEN,
Atty. for Deft.

[Endorsed]: Filed Mar. 25, 1948. [49]

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF ADDITIONAL PORTION OF RECORD ON APPEAL

The above-named defendant hereby designates the following additional portion of the record in the above-entitled action for transmittal by the Clerk of the above-entitled Court to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Minute entry of December 29, 1947, allow-

ing Intervention of United States of America.

2. This Designation.

MAURICE R. McMICKEN,
Attorney for Defendant.

Copy received 4-1-48.

ZABEL, POTH & PAUL,
By L. M.

Received a copy of the within Defs. Designation of Add. Points, etc., this 1st day of April, 1948.

J. CHARLES DENNIS,
Attorney for Intervenor.

[Endorsed]: Filed Apr. 1, 1948. [50]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered 1 to 50, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Plaintiff's Amended

Designations of Record filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same constitute the record on appeal from the Judgment of said United States District Court for the Western District of Washington to the United States Circuit of Appeals for the Ninth Circuit, filed March 3, 1948.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparing record on appeal herein, to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's Fees for making record, certificate or return.

11 pages at 40c	$ 4.40
38 pages at 10c	3.80
Notice of Appeal	5.00
Total	$13.20

I further certify that the costs of this record have been paid by the attorneys for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 12th day of April, 1948.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy Clerk. [52]

[Endorsed]: No. 11896. United States Circuit Court of Appeals for the Ninth Circuit. Raymond M. Naylor, Appellant, vs. West Construction Company, a Corporation, and United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed April 14, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11896

RAYMOND M. NAYLOR,

Appellant,

vs.

WEST CONSTRUCTION COMPANY, a Corporation,

Appellee.

ADOPTION OF STATEMENT OF POINTS ON APPEAL FILED IN U. S. DISTRICT COURT

Comes now the above-named appellant and hereby adopts the statement of points on appeal heretofore

filed in the United States District Court for the Western District of Washington.

ZABEL, POTH & PAUL, and
FREDERICK PAUL,
By /s/ FREDERICK PAUL,
Attorneys for Appellant.

[Endorsed]: Filed June 11, 1948.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS ON RECORD

Comes now the above-named appellant and hereby designates for printing the entire certified transcript.

ZABEL, POTH & PAUL, and
FREDERICK PAUL,
By /s/ FREDERICK PAUL,
Attorneys for Appellant.

[Endorsed]: Filed June 11, 1948.